Supreme Court, U. S.
FILED
FEB 26 1980
MICHAEL RODAK, JR., CLERK

No. 79-672

In the Supreme Court of the United States

OCTOBER TERM, 1979

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

RETAIL STORE EMPLOYEES UNION, LOCAL 1001, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

MARION GRIFFIN
Attorney
National Labor Relations Board
Washington, D.C. 20570

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	3
A. The Board's findings of fact	3
B. The Board's decision and order	5
C. The decision of the court of appeals	7
Summary of argument	7
Argument	11
I. The Board properly concluded that consumer picketing by a labor union at the premises of a neutral retailer violates Section 8(b)(4)(ii)(B) of the National Labor Relations Act when, though it is directed at the product of the firm with which the union has a dispute, the predictable result of the picketing, if successful, will be to persuade the retailer's customers to cease dealing with it altogether	11
II. Section 8(b)(4)(ii)(B) as applied in this case is constitutional	22
Conclusion	26

CITATIONS

Cases: Page

Adderley v. *Florida*, 385 U.S. 39 25
American Bread Co. v. *NLRB*, 411 F.2d 147 18
American Radio Ass'n v. *Mobile Steamship Ass'n*, 419 U.S. 215 22
Babbitt v. *United Farm Workers*, No. 78-225 (June 5, 1979) 23
Hoffman v. *Cement Masons Union Local 337*, 468 F.2d 1187 18
Honolulu Typographical Union No. 37 v. *NLRB*, 401 F.2d 952 ..... 14, 18, 23
Hughes v. *Superior Court*, 339 U.S. 460 22
Int'l Brotherhood of Electrical Workers, Local 501 v. *NLRB*, 341 U.S. 694 22
K & K Construction Co. v. *NLRB*, 592 F.2d 1228 18
Linmark Associates v. *Willingboro*, 431 U.S. 85 25
Local 14055, United Steelworkers of America, AFL-CIO, 524 F.2d 853, denying enforcement of 211 N.L.R.B. 649, judgment vacated and remanded for reconsideration in light of intervening circumstances, 429 U.S. 807, complaint dismissed because of mootness, 229 N.L.R.B. 302 ..... 6, 7
Madison School District v. *Wisconsin Employment Relations Commission*, 429 U.S. 167 25
NLRB v. *Fruit and Vegetable Packers, Local 760*, 377 U.S. 58 ..... *passim*
NLRB v. *Iron Workers*, 434 U.S. 335 25

Cases—Continued Page

NLRB v. *Weingarten*, 420 U.S. 251 25
Police Department of the City of Chicago v. *Mosely*, 408 U.S. 92 24
Radio Officers' Union v. *NLRB*, 347 U.S. 17 15
Superior Derrick Corporation v. *NLRB*, 273 F.2d 891 21
Virginia Pharmacy Bd. v. *Va. Consumer Council*, 425 U.S. 748 25

Statute:

National Labor Relations Act, Section 8(b)(4)(ii)(B), 29 U.S.C. 158(b)(4)(ii)(B) ..... *passim*

Miscellaneous:

105 Cong. Rec. 6667 (1959) 17
105 Cong. Rec. 15672-15673 (1959) 17
Engel, *Secondary Consumer Picketing—Following the Struck Product*, 52 Va. L. Rev. 189 (1966) 22
II Leg. Hist. of the Labor-Management Reporting and Disclosure Act of 1959 (G.P.O. 1959) 17

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-672

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

RETAIL STORE EMPLOYEES UNION, LOCAL 1001, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 1a-44a) is not yet officially reported. The decision and order of the National Labor Relations Board (Pet. App. 47a-66a) are reported at 226 N.L.R.B. 754.

JURISDICTION

The judgment of the court of appeals (Pet. App. 45a-46a) was entered on June 29, 1979. On September 14, 1979, the Chief Justice extended the time in which to file a petition for a writ of certiorari to October 27, 1979. The petition was filed on October 24, 1979, and was granted on January 7, 1980 (A. 47). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether consumer picketing by a labor union at the premises of a neutral retailer, directed at the product of a firm with which the union has a dispute, is prohibited by Section 8(b)(4)(ii)(B) of the National Labor Relations Act when the predictable result of the picketing, if successful, will be to persuade the retailer's customers to cease dealing with it altogether.

STATUTE INVOLVED

Section 8(b) of the National Labor Relations Act, 29 U.S.C. 158(b), provides in relevant part:

> It shall be an unfair labor practice for a labor organization or its agents—
>
> * * * * *
>
> (4)(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
>
> * * * * *

> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person * * *: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing: * * * *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;
>
> * * * * *

STATEMENT

A. The Facts

The facts were stipulated by the parties (A. 13-22). Respondent, the certified bargaining representative of certain employees of Safeco Title Insurance Company, called a strike following an impasse in negotiations for an initial contract (Pet. App. 50a; A. 14).

In addition to picketing Safeco's office, striking employees also engaged in picketing and handbilling outside the offices of five land title companies that sell only Safeco title insurance policies (Pet. App. 50a-51a; A. 15-20).[1]

The signs carried by the strikers stated (Pet. App. 50a-51a; A. 15-20):

> SAFECO NONUNION DOES NOT EMPLOY MEMBERS OF OR HAVE CONTRACT WITH RETAIL STORE EMPLOYEES LOCAL 1001

The strikers also distributed handbills to the general public requesting policyholders to support the strike by cancelling their insurance policies with designated "Safeco Group Companies" (Pet. App. 51a; A. 21, 43).[2] The Union's activities at the land title companies did not cause any work stoppages or interference with deliveries (Pet. App. 51a; A. 15-20).

From 90 to 95 percent of the income of the land title companies is derived from the issuance of Safeco title insurance policies; the remaining 5 to 10 percent, from title research and escrow services (Pet. App. 51a; A. 15-20). Each land title company operates under an agency contract with Safeco, under which Safeco underwrites all title insurance issued by it and

---

[1] The picketed companies were Land Title Co. of Pierce County, Land Title Co. of Snohomish County, Land Title Co. of Kitsap County, Land Title Co. of Cowlitz County, and Land Title Co. of Clark County (A. 15-20).

[2] These companies were identified as Safeco Life Insurance Company, Safeco Insurance Company of America, General Insurance Company of America, and First National Insurance Company of America (A. 43).

the land title company agrees not to act as agent for any other title insurance company without Safeco's consent (A. 15-20, 25, 28, 32).[3] The land title companies do not have authority to issue title insurance policies in their own name (A. 21).

Safeco owns stock in all of the land title companies: 53 percent in one company and amounts ranging from 12 to 38 percent in the other four (Pet. App. 51a-52a; A. 15-20). The remaining stock is held by various individuals (Pet. App. 52a; A. 15-20). An officer of Safeco serves as an officer and member of the board of directors of each land title company (Pet. App. 52a; A. 15-20).[4]

Each land title company independently establishes its employees' wages, hours and other terms and conditions of employment. All employees of each land title company perform their work in the local area of their company and there is no interchange of employees between Safeco and the land title companies. (Pet. App. 51a-52a; A. 15-20.)

B. The Board's Decision and Order

The Board concluded that the land title companies were neutrals in the dispute between Safeco and the Union, rather than "allies" of Safeco (Pet. App. 54a-

---

[3] All the agency contracts are substantially identical to the one reproduced at A. 25-32.

[4] Land Title Co. of Clark County, the land title company in which Safeco is a majority shareholder, has two Safeco officers on its board of directors (Pet. App. 52a n.4; A. 20).

58a). The Board then considered the applicability of *NLRB* v. *Fruit & Vegetable Packers, Local 760*, 377 U.S. 58 (1964) (*"Tree Fruits"*), where this Court ruled that Section 8(b)(4)(ii)(B) permits a union to engage in consumer picketing at the site of a secondary employer "directed only at the struck product," but outlaws "a union appeal to the public at the secondary site not to trade at all with the secondary employer" (377 U.S. at 63). Relying on its decision in *Local 14055, United Steelworkers of America, AFL-CIO*, 211 N.L.R.B. 649 (1974) (*"Dow Chemical"*), which involved a similar situation, the Board concluded that, although the Union's secondary-site picketing was limited to Safeco's products, it violated Section 8(b)(4)(ii)(B) because it was "reasonably calculated to induce customers not to patronize the neutral parties at all" (Pet. App. 58a-59a). Since almost the entire business of the companies was devoted to the sale of Safeco insurance policies, the picketing, if successful, "would predictably involve a virtually complete boycott of the land title companies. * * * The land title companies, powerless to resolve the dispute, would be forced to cease doing business with Safeco or go out of business" (Pet. App. 59a). The Board ordered the Union to cease its unlawful conduct (Pet. App. 61a).[5]

[5] Two members of the Board dissented on the ground that the picketing was lawful since it was directed only at the struck product and because, in any event, the land title companies were not "neutral employers" (Pet. App. 63a-65a).

C. The Decision of the Court of Appeals

The court of appeals, sitting en banc and dividing 5 to 4, denied enforcement of the Board's order (Pet. App. 1a-44a).[6]

The court upheld the Board's finding that the land title companies were neutrals in the Union's dispute with Safeco (Pet. App. 6a-11a). Following its earlier decision in *Dow Chemical*,[7] however, the court held that because the picketing was limited to the struck product the foreseeable economic consequences to the neutrals were not a sufficient basis for finding that the picketing "threaten[ed], coerce[d], or restrain[ed]" the neutrals within the meaning of Section 8(b)(4)(ii)(B) of the Act (Pet. App. 26a-32a).

The dissenting judges agreed with the Board that *Tree Fruits* does not protect picketing of a neutral retailer where the intended or foreseeable effect of the picketing is to persuade the retailer's customers to cease dealing with it altogether (Pet. App. 35a-44a).

SUMMARY OF ARGUMENT

Although this Court in *Tree Fruits* held that peaceful picketing at a retail store urging consumers not to purchase the product of an employer with whom

[6] The decision of a divided panel of the court, 99 L.R.R.M. 3330 (1978), which had upheld the Board's decision, was vacated when the case was set down for en banc consideration.

[7] *Local 14055, United Steelworkers of America* v. *NLRB*, 524 F.2d 853 (D.C. Cir. 1975), denying enforcement of 211 N.L.R.B. 649 (1974), judgment vacated and remanded for reconsideration in light of intervening circumstances, 429 U.S. 807 (1976), complaint dismissed because of mootness, 229 N.L.R.B. 302 (1977).

the union had a primary dispute did not constitute a threat, coercion, or restraint within the meaning of Section 8(b)(4)(ii)(B) of the Act, it did so in a context where it was clear that the object of the picketing was not to cut off all trade with the neutral store. The picketing in *Tree Fruits* was addressed to only one of numerous products sold by the neutral store, and the Court emphasized that, if the union's "appeal succeed[ed], the secondary employer's purchases from the struck firms [would be] decreased only because the public ha[d] diminished its purchases of the struck product" (377 U.S. at 72). The Court contrasted that situation with "consumer picketing" that "is employed to persuade customers not to trade at all with the secondary employer" and is "designed to inflict injury on his business generally" (*ibid.*). The latter type picketing, the Court held, would "threaten, coerce, or restrain" the secondary employer and thus would violate Section 8(b)(4)(ii)(B) of the Act.

In the present case, no clear distinction can be made between picketing that is limited to persuading customers not to buy the struck product and picketing aimed at the secondary's patronage generally. Here, the picketed product constitutes such a large portion of the neutral's business that the picketing, if successful, would necessarily result in a boycott of the neutral's total business. In these circumstances, the Board properly determined that the Union's picketing was unlawful because it was "reasonably calculated

to induce customers not to patronize the neutral parties at all" (Pet. App. 58a).

Contrary to the view of the court below, *Tree Fruits* does not hold that, so long as picketing is directed at the struck product, it is lawful regardless of its intended or foreseeable effect on the neutral's total business. Rather, the Court left it to the Board to determine in each case, subject to judicial review, whether the union's picketing manifests an intent "to cut off the business of a secondary employer as a means of forcing him to stop doing business with the primary employer" (377 U.S. at 68). Picketing with such an object is unlawful, whether or not it is limited in terms to a struck product.

This view is supported by the legislative history of Section 8(b)(4)(ii), which shows, as *Tree Fruits* recognizes, that Congress intended to proscribe the use of consumer picketing at secondary sites "to persuade the customers of the secondary employer to cease trading with him in order to force him to cease dealing with, or to put pressure upon, the primary employer" (377 U.S. at 63). Further support is provided by the "merged product" cases, in which the Board has held, with uniform court approval, that product picketing at neutral sites is outlawed where the product of the primary employer has become so integrated with that of the neutral that the picketing amounts to an appeal to stop trading with the neutral altogether. The impact of picketing as pressure for a total boycott of the neutral is the same whether it is achieved because the primary employer's product has

merged into that of the neutral or because virtually all of the neutral's business consists of selling that product.

There is no merit to the suggestion of the court below (Pet. App. 34a-35a) that prohibition of the Union's picketing here would raise a substantial constitutional question. As *Tree Fruits* recognizes, although "a broad ban against peaceful picketing" might be unconstitutional, it was proper for Congress to deal with the "isolated evil" of "peaceful consumer picketing at secondary sites * * * to persuade the customers of the secondary employer to cease trading with him in order to force him to cease dealing with, or to put pressure upon, the primary employer" (377 U.S. at 63). Read "as barring only picketing urging [a] total consumer boycott, * * * the statute strikes narrowly at those 'inherently compulsive features' present when consumers must cross a line" (Pet. App. 40a n.1 (dissenting opinion)). The narrowness of that prohibition here is emphasized by the publicity proviso to Section 8(b)(4), under which the Union was free to advise the public of its dispute with Safeco through distributing handbills at the secondary sites, or by any other form of publicity other than picketing.

ARGUMENT

I. THE BOARD PROPERLY CONCLUDED THAT CONSUMER PICKETING BY A LABOR UNION AT THE PREMISES OF A NEUTRAL RETAILER VIOLATES SECTION 8(b)(4)(ii)(B) OF THE NATIONAL LABOR RELATIONS ACT WHEN, THOUGH IT IS DIRECTED AT THE PRODUCT OF THE FIRM WITH WHICH THE UNION HAS A DISPUTE, THE PREDICTABLE RESULT OF THE PICKETING, IF SUCCESSFUL, WILL BE TO PERSUADE THE RETAILER'S CUSTOMERS TO CEASE DEALING WITH IT ALTOGETHER

A. Section 8(b)(4)(ii)(B) of the Act makes it an unfair labor practice for a union "to threaten, coerce, or restrain any person" with the object of forcing or requiring that person to "cease doing business with any other person." The Board found, and the court of appeals agreed, that the title companies were neutrals in the Union's dispute with Safeco (*supra*, pages 5-6, 7),[8] and that the object of the Union's picketing at the companies' premises was to put pressure on the companies to cease doing business with Safeco, with whom the Union had its primary dispute. Accordingly, the sole question is whether the means utilized by the Union to exert its pressure on the title companies—i.e., consumer picketing directed at the product of the firm with which the Union has its dispute—is the type of threat, coercion, or restraint which Congress intended to proscribe under subparagraph (ii) of Section 8(b)(4). The answer to this

[8] That finding is not in issue here. In any event, the finding is clearly correct for the reasons stated by the Board and the court of appeals (Pet. App. 6a-11a, 54a-58a).

question turns on application of the principles enunciated by this Court in *Tree Fruits, supra.*

The union in *Tree Fruits* picketed neutral Safeway stores to persuade Safeway's customers to boycott apples in support of the union's primary dispute with apple packers and distributors (377 U.S. at 59-61). Rejecting the Board's ruling that all such secondary picketing was illegal *per se* (132 N.L.R.B. 1172 (1961)), the Court determined that in enacting Section 8(b)(4)(ii)(B) Congress had meant to outlaw peaceful consumer picketing at secondary sites when that picketing was employed "to persuade the customers of the secondary employer to cease trading with him in order to force him to cease dealing with, or to put pressure upon, the primary employer" (377 U.S. at 63), but Congress did not intend to outlaw such picketing which, as in the case before it, "only persuades [the neutral's] customers not to buy the struck product" (377 U.S. at 70). The Court explained (377 U.S. at 72):

> When consumer picketing is employed only to persuade customers not to buy the struck product, the union's appeal is closely confined to the primary dispute. The site of the appeal is expanded to include the premises of the secondary employer, but if the appeal succeeds, the secondary employer's purchases from the struck firms are decreased only because the public has diminished its purchases of the struck product. On the other hand, when consumer picketing is employed to persuade customers not to trade at all with the secondary employer, the latter stops buying the struck product, not because of a falling demand, but in response to pressure designed to inflict injury on his business generally. In such case, the union does more than merely follow the struck product; it creates a separate dispute with the secondary employer. [Footnote omitted.]

The facts of *Tree Fruits* permitted a clear distinction between picketing limited to persuading customers not to buy the struck product and picketing aimed at the secondary's patronage generally. Apples occupy but a small portion of Safeway's retail shelves, and the union could urge Safeway's customers to refrain from buying them without asking that they cease trading with Safeway altogether. *Tree Fruits* did not deal with a situation where, as here, such a sharp distinction cannot be made—*i.e.*, where, although the picketing is directed at the struck product, that product constitutes such a large portion of the neutral's business, or has become so integrated in that business, that the picketing, if successful, would necessarily result in a boycott of the neutral's total business. In such a situation, it is for the Board, subject to judicial review, to determine, after considering all the circumstances, whether the union's conduct amounts to the "isolated evil" Congress desired to prohibit—picketing used "to cut off the business of a secondary employer as a means of forcing him to stop doing business with the primary employer" (377 U.S. at 68). The rationale of *Tree Fruits* indicates that picketing having such an object is unlawful, whether

or not it also happens to be limited in terms to the struck products.[9]

B. We submit that the Board reasonably determined that the Union's picketing of the title companies was unlawful because, though directed only at Safeco's insurance policies, "the picketing [was] reasonably calculated to induce customers not to patronize the neutral parties at all" (Pet. App. 58a). The stipulated facts (*supra*, pages 3-5) show that between 90 and 95 percent of the title companies' gross revenues are derived from the issuance of Safeco policies and the remainder from title research and escrow services, which are largely ancillary to the issuance of title insurance policies. The land title companies have no authority to issue title insurance in their own names or to act as agents for any other title insurance company without Safeco's permission. In

[9] The character of product picketing changes when the product constitutes all or virtually all of the neutral's business. As the Court of Appeals for the District of Columbia Circuit stated in an analogous situation (see *infra*, pages 18-20):

> When the pickets urge, either directly or by requests that render their meaning obvious, the entire boycott of the secondary establishment, they inject a new element. The restraint generated by the need to cross any such picket line may entirely inhibit consumers who are not whole-hearted union men but are unwilling to be readily identified as hostile or indifferent. There is no similar impact where the picketing acquiesces in the crossing of the picket line but merely urges that the consumer be selective on the inside. It is that sort of limited picketing message that *Tree Fruits* held outside the spirit of § 8(b) (4) (ii) (B). [*Honolulu Typographical Union No. 37* v. *NLRB*, 401 F.2d 952, 957 (1968); footnote omitted.]

these circumstances, the Board was warranted in concluding that "a successful boycott of Safeco insurance policies would predictably involve a virtually complete boycott of the land title companies" (Pet. App. 59a).[10]

Contrary to the view of the court below, nothing in this Court's decision in *Tree Fruits* suggests that, so long as picketing is directed at the struck product, it is lawful regardless of its intended or foreseeable effect on the neutral's total business.[11] As Judge Robb stated in his dissenting opinion (Pet. App. 39a-40a):

[10] The Union must, of course, be deemed to have intended the natural and foreseeable consequence of its conduct. See *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 45 (1954).

[11] The Board in finding a violation here has not, as the court below suggests (Pet. App. 28a-30a), returned to the economic impact test rejected by this Court in *Tree Fruits*. In that case, the court of appeals had held that the picketing there would be unlawful only if the appeal to Safeway's customers to boycott Washington State apples had or was likely to have "a substantial economic impact" on Safeway; it, therefore, remanded the case to the Board for a determination on that issue (308 F.2d at 317-318). This Court found a remand unnecessary since in the circumstances there "[a] violation of § 8(b) (4) (ii) (B) would not be established, merely because respondents' picketing was effective to reduce Safeway's sales of Washington State apples, even if this led or might lead Safeway to drop the item as a poor seller" (377 U.S. at 72-73). The Court was not suggesting that the economic impact of the picketing would be irrelevant in other circumstances, where, as here, the struck product constituted substantially all of the neutral's business. Indeed, the Court emphasized that picketing of a neutral secondary violates Section 8(b) (4) (ii) (B) when it urges the public not to trade with him at all and thus seeks to inflict injury on his business generally (377 U.S. at 63-64, 72).

> [I]nstead of suggesting that its holding is applicable to a case like the one before us, the *Tree Fruits* decision plainly shows that it does not apply to cases in which a retailer sells only the struck product. The Court there recognized that Washington State apples "were only one of numerous food products sold in [Safeway] stores." 377 U.S. at 60. Furthermore, the Court believed that if the boycott at Safeway Stores were successful, the harshest result would be that "Safeway [might]drop the item as a poor seller." *Id.* at 72-73; see *id.* at 72 n.20. That the Court did not intend the exception it recognized for picketing of struck products to encompass and immunize total boycotts is again manifested by its observation that "consumer picketing to shut off all trade with the secondary employer . . . is poles apart from such picketing which only persuades his customers not to buy the struck product." *Id.* at 70. Picketing to shut off all trade, said the Court, is to be barred. *Id.* at 71; see *id.* at 63. The minimal impact to Safeway that the Court envisioned in *Tree Fruits* is thus hardly congruent with what the Board found the union's objective to be in this case—a total loss of patronage to the land title companies.

To put the matter another way, picketing which follows the struck product to a situation such as is involved in this case necessarily "creates a separate dispute with the secondary employer"—the very evil this Court identified in *Tree Fruits* as that which Congress sought to avoid (377 U.S. at 72).

Nor does the legislative history of Section 8(b)(4)(ii) support the view of the court below. While in

Tree Fruits the Court found that that history "does not reflect with the requisite clarity a congressional plan to proscribe all peaceful consumer picketing at secondary sites," it recognized that it did show that Congress intended to proscribe the use of such picketing "to persuade the customers of the secondary employer to cease trading with him in order to force him to cease dealing with, or to put pressure upon, the primary employer" (377 U.S. at 63). And, while the Court concluded that "peaceful picketing at the secondary site directed only at the struck product" (*ibid.*) generally would not have the latter effect, the statements of Senator McClellan and Congressman Griffin, discussed by the Court (377 U.S. at 65-66, 67-68), clearly refer to circumstances, such as those here, where consumer picketing, though confined to the struck product, nonetheless calls for a boycott of the neutral's total business.[12]

---

[12] Thus, Senator McClellan gave as an example of "pressure in the form of dissuading customers from dealing with secondary employers," establishing a picket line around the store of a "merchant [who] may have built his business around the product, such as the John Deere plows or some kind of machinery from some other company"; the "merchant may have built up his trade entirely on that product." 105 Cong. Rec. 6667 (1959), II Leg. Hist. of the Labor-Management Reporting and Disclosure Act of 1959 1194 (G.P.O. 1959) (hereafter "Leg. Hist."). Similarly, Congressman Griffin, in his colloquy with Congressman Brown, stated that Section 8(b)(4)(ii)(B) would prohibit consumer picketing at a retail store selling furniture products made by a manufacturer with whom the union had a primary dispute if "the purpose of the picketing is to coerce the retailer not to do business with the manufacturer." 105 Cong. Rec. 15672-15673 (1959), II Leg. Hist. 1615.

C. The court of appeals' view that *Tree Fruits* establishes a *per se* rule that secondary consumer picketing is privileged so long as it is directed at the struck product is inconsistent with the same court's application of that decision in the "merged product" situation. Thus, in *Honolulu Typographical Union No. 37* v. *NLRB*, 401 F.2d 952 (D.C. Cir. 1968), the court sustained a Board holding that Section 8(b)(4)(ii)(B) barred picketing urging patrons of restaurants not to buy products advertised in a struck newspaper. Since the struck matter (advertising) was incorporated in every item sold by the neutral, the court concluded that the necessary effect of the union's picketing was to call for a total boycott of the neutral's business.[13] Addressing the union's contention that this "interpretation of *Tree Fruits* gives broader immunity to those secondary sellers who happen to be retailing struck primary products that are

[13] Accord: *American Bread Co.* v. *NLRB*, 411 F.2d 147 (6th Cir. 1969) (picketing at eating places calling for a boycott of bread baked and distributed by the primary employer; held to be unlawful "since the subject matter of the picketing had become so integrated into the food served that to cease purchasing the single item would almost amount to customers stopping all trade with the secondary employer" (*id.* at 154)); *Hoffman* v. *Cement Masons Union Local 337*, 468 F.2d 1187 (9th Cir. 1972) (picketing at a housing subdivision calling for a boycott of homes built by a general contractor and sold by the neutral subdivision owner; held to be unlawful since union's "broad suggestion that [the primary's] products not be purchased * * * necessarily encompassed the entire business of * * * the neutral secondary" (*id.* at 1192)). See also *K & K Construction Co.* v. *NLRB*, 592 F.2d 1228, 1232 (3d Cir. 1979) and cases cited therein at 592 F.2d 1232 n.2.

so merged into the seller's total business as to be indistinguishable therefrom," the court answered that "the law makes distinctions in terms of the tradition and economic realities of Union pressure, even though this may result in differences not easily subject to logical delineation between the scope and kinds of picketing available to unions in different labor circumstances" (401 F.2d at 955-956; footnotes omitted). The court added (401 F.2d at 956):

> Here, where picketing means a total boycott, one interest must plainly yield, either the Union's desire to maximize pressure on the primary employer (the newspaper) by cutting off its markets or the neutral's desire to avoid a boycott of his entire business. In the 1959 amendments, Congress chose protection of the neutral from this sort of disruption as the interest more deserving of protection * * *.

Although in *Honolulu Typographical*, the court below disclaimed any intention of passing on the "single product" situation (401 F.2d at 956 n.9), and it sought to distinguish *Honolulu Typographical* here (see note 15, *infra*), the rationale of that decision is equally applicable here.[14] As the court stated in *Hono-*

[14] Indeed, Safeco argued below that this case is itself a merged product case because the work done by the neutral land title companies in maintaining tract indexes, receiving orders, searching records, and preparing reports, commitments, and policies is merged into the struck primary product—Safeco title insurance (Pet. App. 53a). It was unnecessary for the Board to pass on this issue, given its view that merged and single product cases are legally indistinguishable.

lulu Typographical, the character of the union's "conduct as a threat to the secondary seller is a function of its impact on the consumer" (401 F.2d at 957). That impact—pressure for a total boycott of the neutral—is the same whether it is achieved because the primary's product has merged into that of the neutral or because virtually all of the neutral's business consists of selling the primary product. Similarly, the goal of Section 8(b)(4)(ii)(B) to protect neutral employers from being enmeshed in disputes not their own through pressure designed to injure their businesses generally is equally thwarted whether the union's consumer picketing presages a total shutdown of the neutral because there is no separate identifiable primary product to boycott or because the neutral's entire business is dependent on sales of the primary product.[15]

[15] The court below sought to distinguish the two situations on the ground that, when a secondary employer sells a struck product in the form in which it leaves the primary employer, "the secondary retailer's immediate market is also the primary employer's ultimate market, and a union boycott can be structured to follow the struck product into that market without implicating any other product in the secondary employer's inventory." When, however, the struck product has been so blended with another product as to become an integral part of a materially different product, the "struck product no longer has a market of its own and it cannot be pursued into the market for the merged product without implicating its other components" (Pet. App. 31a n.93). But, as shown above (pages 18-19), the statutory purpose of preventing a picket-line appeal for a total boycott of the neutral's business can be thwarted as readily where the struck product retains its market as it can where it merges with another product to create a new market. Accordingly, the distinction drawn by the court below is irrelevant for purposes of Section 8(b)(4)(ii)(B).

Nor may the decision of the court below in this case be justified on the ground that the picketing placed no more pressure on the neutrals than that which would have been exerted had the primary strike been successful (Pet. App. 25a). See also *Honolulu Typographical Union No. 37* v. *NLRB*, *supra*, 401 F.2d at 955. The contention that a union may lawfully exert on a neutral the same degree of pressure that would be exerted by a successful primary strike has been rejected in other contexts as a distortion of congressional intent under Section 8(b)(4) of the Act. As the Fifth Circuit stated in *Superior Derrick Corporation* v. *NLRB*, 273 F.2d 891, 896, cert. denied, 364 U.S. 816 (1960): "[T]his is to disregard the plain language and purpose of 8(b)(4)(ii)(A) and (B) * * *. For if illegality is to be measured by the comparable effect which the picket line would have [at the primary's premises], a primary union might have —and could even express it in categorical terms—a purpose and intent to cause the secondary employer to cease doing business with the primary employer and yet the conduct would still be legal." "It is precisely because primary activity may *not be sufficiently successful* to cause the kind of interference with the business of the secondary employer which will result in the exertion of secondary pressure to force the primary employer to settle the labor dispute that Congress sought to prohibit unions from accomplishing

by other means that which they could not accomplish directly." Engel, *Secondary Consumer Picketing—Following the Struck Product*, 52 Va.L. Rev. 189, 212 (1966) (emphasis in original). There is no reason to believe that, in *Tree Fruits*, the Court, in carving out a limited exception for secondary product picketing, intended to upset this well settled law. On the contrary, as shown above (pages 12-17), the test enunciated by the Court in *Tree Fruits* is not whether the picketing puts no more pressure on the neutral than would a successful primary strike, but rather whether the picketing is designed to shut off all trade with the neutral. The Union's picketing here met that test.

II. SECTION 8(b)(4)(ii)(B) AS APPLIED IN THIS CASE IS CONSTITUTIONAL

There is no merit to the suggestion of the court below (Pet. App. 34a-35a) that the Union's picketing here could not constitutionally be regulated. "[W]hile picketing is a mode of communication it is inseparably something more and different." *Hughes* v. *Superior Court*, 339 U.S. 460, 464 (1950). Because of the "compulsive features inherent in picketing" (*id.* at 468), picketing aimed at preventing effectuation of a constitutionally permissible legislative policy may be constitutionally enjoined. *Teamsters Union* v. *Vogt*, 354 U.S. 284, 289-290, 293 (1957); *American Radio Ass'n* v. *Mobile Steamship Ass'n*, 419 U.S. 215, 229-231 (1974); *Int'l Brotherhood of Electrical Workers, Local 501* v. *NLRB*, 341 U.S. 694, 705 (1951).

Accordingly, as *Tree Fruits* itself recognizes, although "a broad ban against peaceful picketing" might be unconstitutional, it was proper for Congress to deal with the "isolated evil" of "peaceful consumer picketing at secondary sites * * * to persuade the customers of the secondary employer to cease trading with him in order to force him to cease dealing with, or to put pressure upon, the primary employer" (377 U.S. at 63). See also *Babbitt* v. *United Farm Workers*, No. 78-225 (June 5, 1979), slip op. 20 n.17 ("picketing aimed at discouraging trade across the board with a truly neutral employer may be barred compatibly with the Constitution"). As the dissenting opinion below concluded, the statutory prohibition against the picketing in this case does not raise "substantial first amendment questions; for '[r]ead as barring only picketing urging [a] total consumer boycott, . . . the statute strikes narrowly at those "inherently compulsive features" present when consumers must cross a line.'" (Pet. App. 40a n.1, quoting *Honolulu Typographical Union No. 37* v. *NLRB*, *supra*, 401 F.2d at 957 n.11).

The narrowness of the prohibition here is emphasized by the proviso to Section 8(b)(4) specifically exempting "publicity, other than picketing, for the purpose of truthfully advising the public * * * that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer," provided that the publicity does not have the effect of cutting off the neutral's deliveries or inducing his

employees to cease work. See *Tree Fruits, supra*, 377 U.S. at 70-71. Thus, the Union here was free to advise the public of its dispute with Safeco by distributing handbills at the neutral title companies' premises; it was merely prohibited from using the compulsive features inherent in a picket line with an object of shutting off all trade with the neutrals.[16]

Police Department of the City of Chicago v. *Mosley*, 408 U.S. 92 (1972), relied on by the Union below, does not support its claim of unconstitutionality. The city ordinance found unconstitutional there prohibited all picketing within 150 feet of a school, except peaceful picketing of any school involved in a labor dispute. In finding the ordinance violative of the Equal Protection Clause, the Court held that no valid legislative purpose was served by broadly prohibiting all picketing near schools, while exempting peaceful labor picketing, since there was no basis for the city's claim that nonlabor picketing is more apt to produce violence than labor picketing (408 U.S. at 100-102). Here, by contrast, there is a valid legislative purpose in prohibiting unions from using secondary boycotts

[16] Contrary to the suggestion of the court below (Pet. App. 34a-35a), that prohibition is not unconstitutionally indefinite because it requires inferring an unlawful object from the surrounding facts. An unlawful object is rarely admitted and must usually be inferred. The facts supporting such an inference here—that almost the entire business of the neutrals is devoted to the sale of the primary's product so that the union's picketing, if successful, would predictably result in a virtually complete boycott of the neutrals' businesses—are neither impermissibly vague nor difficult of ascertainment.

to enmesh neutrals in labor disputes not their own.[17] The First Amendment, of course, "does not command 'that people who want to [voice] their views have a constitutional right to do so whenever and however and wherever they please.'" *Madison School District* v. *Wisconsin Employment Relations Commission*, 429 U.S. 167, 178 (1976) (concurring opinion of Mr. Justice Brennan), quoting *Adderley* v. *Florida*, 385 U.S. 39, 48 (1966).

In sum, we submit that no substantial First Amendment issue is presented here and that "'[t]he Board's resolution of the conflicting claims in this case represents a defensible construction of the statute'" entitled to judicial affirmance (Pet. App. 43a (dissenting opinion), quoting *NLRB* v. *Iron Workers*, 434 U.S. 335, 350 (1978)). See also *NLRB* v. *Weingarten*, 420 U.S. 251, 260, 266-267 (1975).

[17] Even less pertinent are cases cited by the Union below where restrictions on various forms of communication other than picketing were found not justified by a valid legislative purpose. See, *e.g.*, *Virginia Pharmacy Bd.* v. *Va. Consumer Council*, 425 U.S. 748 (1976) (invalidating statute declaring it unprofessional conduct for licensed pharmacists to advertise price of prescription drugs); *Linmark Associates* v. *Willingboro*, 431 U.S. 85 (1977) (invalidating township ordinance prohibiting the posting of "for sale" and "sold" signs on real estate). Those cases did not involve the compulsive elements inherent in a picket line, and, to the extent they may suggest a constitutional right of the public to be informed of the existence of a labor dispute between the neutrals and the primary employer, that right is satisfied by the proviso authorizing publicizing of the dispute by means other than picketing.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

MARION GRIFFIN
Attorney
National Labor Relations Board

FEBRUARY 1980

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 314425 238